

REMARKS

The pending Office Action was reviewed carefully, before preparing this response. In light of the accompanying Request for Continued Examination, this application is believed to be in condition for allowance.

Several claims were rejected, again, under 35 U.S.C. § 103 as unpatentable over Marshall in view of Osaka. Applicants respectfully disagree. This combination of references does not establish *prima facie* obviousness, and the rejection should be withdrawn.

In a determination of obviousness, a prior art reference must be considered in its entirety. It is impermissible within the framework of § 103 to pick and choose from any one reference only so much of it as will support a given position, to the exclusion of what that reference would fairly suggest to one skilled in the art. Here, Marshall is directed to a fermented soybean product without a chalky or otherwise unpleasant mouth-coating texture prevalent in the art. (See, column 1 at lines 15-21 and column 2 at lines 18-26.) Toward that end, Marshall describes various process parameters: most importantly, the requirement that fermentation be carried out between pH 6.0 and pH 7.0. More specifically, Marshall states that soy protein begins to precipitate at a pH below 6.0 (column 5 at lines 1-8).

However, consideration of Osaka shows that, in this area of the food science art, effect of pH on a fermented soy material is unpredictable. While a pH below 6.0 is unacceptable in Marshall, Osaka describes a wide pH range, including pH parameters much below 6.0. In example 4 and as cited by the Examiner, a pH of 3.6 was desired for the subject fermented milk product. (See, Osaka, column 6 at lines 15-44.) However, when interrupting fermentation, a pH of 4-5 deteriorates the functional properties of the soy bean proteins. (See, Osaka, column 3 at lines 65-68.) Yet, quite to the contrary, Applicants beneficially utilize a pH of about 4 - about 5. Marshall, Osaka and other art in this area show an infinite number of processing approaches can be taken, depending upon choice of soybean product. Unpredictable results preclude application of an approach for

one product (e.g., soy cream cheese in Marshall) to another (e.g., fermented soy milk in Osaka).

There is no reasonable expectation that combination of Marshall with Osaka would provide beneficial results. The record shows quite clearly that there would be no reason for one skilled in the art to begin with the method of Marshall only to change the very feature (pH above 6.0) that gives Marshall its advantage. Simple substitution of one pH (6.0 in Marshall) or another (4-5, or below, in Osaka) can not be expected to provide predictable, satisfactory results. Variations of Marshall by Osaka would not have been predicted by one skilled in the art. In fact, the only thing predictable by using the pH of Osaka with Marshall is an unacceptably inferior soy product--with either protein precipitation, as stated in Marshall, or deteriorated protein function, as stated in Osaka. Accordingly, there is no motivation to combine Marshall with Osaka, and there is no motivation to do what Applicants have done.

In *KSR International*, the Supreme Court promoted the use of common sense in determining obviousness. (See, *KSR International Co. v. Teleflex, Inc.*, 550 U.S. 398, 127 S. Ct. 1727, 1742, 167 L. Ed. 2d 705 (2007)). There is no evidence of record that supports the Examiner's contention that Osaka discloses a pH parameter which could be used in conjunction with Marshall to provide Applicants' invention. To the contrary, both Marshall and Osaka are replete with evidence directing one away from use of a pH in the range cited by Applicants. Here, common sense dictates that the present invention is not obvious.

Clearly, the Examiner did not follow the post-*KSR International* guidelines established by the Patent Office for determining obviousness. (See, 72 Fed. Reg. 57, 526; October 10, 2007.) The Examiner is respectfully requested to follow and apply the PTO guidelines or explain why, in this instance, those guidelines should be replaced by criteria chosen by the Examiner. As discussed above, proper consideration of such guidelines shows that there is no *prima facie* obviousness.

Accordingly, the rejection should be withdrawn, with the subject claims allowed to proceed toward issue.

This application is believed to be in condition for allowance. Consistent therewith, favorable action is respectfully requested. The Examiner is invited to contact the undersigned by telephone should any issue remain. Thank you for your help and consideration.

Respectfully submitted:

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